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Foster Placement Review: Problems and Opportunities

I. Introduction

Foster care¹ is intended to provide temporary out-of-home child care until the biological parents are able to provide an adequate home for their children.² Yet thousands of children today spend a major part of their childhood drifting from one foster placement to another, with little or no contact with their biological parents.³ Concern for the increasing number of children left in foster care for lengthy periods⁴ at serious cost to the child's sense of permanence⁵ and financial burden to the government, has prompted some states and localities to implement programs of periodic review⁶ of children placed outside their homes.⁷

This comment analyzes the various child placement review schemes that have evolved. The dilemma of foster children left "in limbo" is examined and typical legislative review paradigms are described and evaluated. Moreover, elements necessary among all the review systems for effective reviews are explored. Finally, attention

1. As used herein, foster care is 24-hour child care outside the home of the child's legally recognized parent or guardian provided for children who enter the foster care system through a child welfare agency or the courts.

2. Steketee, *The CIP Story*, 28 JUV. JUST. 4, 4 (1977).

3. See notes 10, 23-25 and accompanying text *infra*.

4. See *In re Clear*, 58 Misc. 2d 699, 700, 296 N.Y.S.2d 184, 185 (1969), for judicial recognition of the problems of children left in prolonged foster care. See also *Wall Street Journal*, Sept. 6, 1978, at 1, col. 1.

5. See Goldstein, *Why Foster Care - For Whom for How Long?*, 30 PSYCHOANALYTIC STUDY OF THE CHILD 647 (1975).

6. Child placement review programs are classified into three types herein: internal agency review, judicial or court-administered review, and citizen board review. For further explanation of these categories see Part III *infra*.

7. See *In re Dionisio R.*, 81 Misc. 2d 436, 366 N.Y.S.2d 280 (1975) (the court notes that the legislature in enacting § 392 of the Social Services Law (providing for review of foster care placements) hoped not only to save money but also to prevent foster children from becoming "lost" children and to expedite the making of permanent plans for them); State of New Jersey, Statement of Insts., Health and Welfare Comm. to Senate Comm. Substitute for Senate, No. 3246, 1 (1977) (describing the New Jersey bill (now N.J. STAT. ANN. §§ 30:4C-50 to 4C-65 (West Supp. 1978)) as a response to inappropriate placement of children in foster care for lengthy periods).

Since this comment was written New Jersey has amended its child Placement Review Act by enacting Senate Bill 1208 on October 16, 1978. The two versions may still be beneficially contrasted.

is given to factors external to a review system that significantly affect the success of the system. Throughout this treatment the respective interests of the child, biological parents, foster parents, child care agency,⁸ and public are considered.

It is hoped that this analysis will serve as an impetus for development of programs of independent child placement review⁹ by states that currently have no provision for these programs, and also as an aid in selecting a review scheme best tailored to local needs and resources. Issues likely to arise in the formation of a review procedure have been identified and resolutions suggested. States that have already enacted child placement review legislation should find this comment helpful in re-examining areas of their procedure that do not promote effective review or adequately safeguard the rights of the concerned parties.

II. Problem Observed

The Department of Health, Education and Welfare estimates that between 400,000 and 450,000 children¹⁰ are currently in temporary foster care placements¹¹ in the United States.¹² The combined

8. The terms "agency" or "child care agency" are used herein to describe any child welfare agency, public or private, that is responsible for children removed from their parental home or for placing children in foster care.

9. The phrase "independent child placement review" refers to any placement review system that operates outside the auspices of the child care agency responsible for placement of the child.

10. The number of children in temporary foster care placements has increased in the past several years. In 1959 an estimated 254,000 children were in foster care in the United States. H. MAAS & R. ENGLER, *CHILDREN IN NEED OF PARENTS* 417 (1959). By 1973 that estimate had climbed to 285,000. Mnookin, *Foster Care - In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 600 (1973). In late 1975 the estimate of children in foster care reached 400-450,000. *Joint Hearings on Foster Care Before the House Subcomm. on Select Education and the Senate Subcomm. on Children and Youth*, 94th Cong., 1st Sess. 35 (1975) [hereinafter cited as *1975 Hearings*] (statement of John C. Young, Commissioner, Community Services Administration, Social and Rehabilitation Service, Department of Health, Education and Welfare).

11. About 75% of these 400-450,000 children are in family foster care (child lives in home of foster parents who act as substitute parents), 2% in group homes (group of children placed in a shelter with caretakers who act as parents), and the majority of the remaining 23% in institutions (public or private, and often are reserved for children with special problems such as drug abuse, emotional disturbance, mental retardation, physical handicaps, or delinquency). *1975 Hearings*, *supra* note 10, at 35 (statement of John C. Young).

Children are temporarily placed in foster care for a variety of reasons. *E.g.*, *1975 Hearings*, *supra* note 10, at 35 (statement of John C. Young) (foster placements occur because of broken homes, abuse or neglect by parents or caretakers, mental or physical handicaps of the child that cannot be handled at home, behavioral problems of the child, refusal of the parent or parents to care for the child, and inability of the parents to care for the child because of their mental or physical incapacity, disaster, or loss of shelter). *See also* Festinger, *The New York Court Review of Children in Foster Care*, 54 CHILD WELFARE 211, 221 (1975); S. VASALY, *FOSTER CARE IN FIVE STATES: A SYNTHESIS AND ANALYSIS OF STUDIES FROM ARIZONA, CALIFORNIA, IOWA, MASSACHUSETTS, AND VERMONT*, U.S. Dep't of HEW Pub. No. (OHD) 76-30097, 23 (1976); Comment, *In the Child's Best Interests: Rights of the Natural Parents in Child Placement Proceedings*, 51 N.Y.U. L. REV. 446, 457 (1976) [hereinafter cited as N.Y.U. L. REV.].

12. Some statewide figures for children in foster care are noted here to permit compari-

cost to federal, state¹³ and local governments of providing foster care for these children is estimated to be over seven hundred million dollars per year.¹⁴

Nationwide, approximately fifty percent of all children are placed in foster care voluntarily.¹⁵ The "voluntary" nature of child placement, however, has been seriously questioned.¹⁶ Parents may consent to temporarily relinquish their child only to avoid a court proceeding.¹⁷ Temporary surrender of a child to agency custody¹⁸ may become involuntary at a later date, because of placement agreements that many states require parents to sign when surrendering

son of the type of state review system selected by size of state foster care population. H. GOLDIN, *THE CHILDREN ARE WAITING: THE FAILURE TO ACHIEVE PERMANENT HOMES FOR FOSTER CHILDREN IN NEW YORK CITY*, 2 (1977) (New York - 29,000); M. JONES, *FOSTER CARE REVIEW SYSTEMS: A REVIEW OF LEGISLATION AND PROGRAMS AND RECOMMENDATION FOR A PENNSYLVANIA REVIEW SYSTEM*, U.S. Dep't of HEW Pub. No. RO3-1663-77, 25 (1977) (Pennsylvania - 12,000 children in foster care); J. PERS, *GOVERNMENT AS PARENT: ADMINISTERING FOSTER CARE IN CALIFORNIA*, 1 (1976) (California - 30,000); Interview with William Van Meter, Assistant Administrator, Office of Program Support, New Jersey Division of Youth and Family Services (DYFS) (Aug. 18, 1978) [hereinafter cited as N.J. DYFS Interview] (New Jersey - 11,000); Fact sheet, Children's Foster Care Review Board System and Office of Child Advocacy, Columbia, South Carolina (1977) (South Carolina - 4,000).

13. The 1977 estimated cost of maintaining a child in foster care in Pennsylvania for one year is \$1452, excluding such expenses as clothing and medical and dental expenditures. M. JONES, *supra* note 12, at 26. In New York the estimated cost of maintaining a child in foster care for one year is \$4964, and the total yearly cost to the public for foster care in New York is \$280 million. H. GOLDIN, *supra* note 12, at 2. See also S. VASALY, *supra* note 11, at 118.

For cost estimates of various state child placement review systems, see M. JONES, *supra* note 12, at 38-39. For estimated state and local government expenditures necessary to implement the New Jersey Child Placement Review Act, see State of New Jersey, Fiscal Note to Senate Comm. Substitute for Senate, No. 3246, 1 (1977).

14. This estimated cost is for 350,000 foster children in 1975. The lowest estimate of cost per child by HEW for one year of foster care in 1975 was \$2000. 1975 *Hearings*, *supra* note 10, at 20, 27 (statement of John C. Young).

15. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *LEGAL ISSUES IN FOSTER CARE* 1 (Feb. 1976) [hereinafter cited as *Legal Issues in Foster Care*]. "Voluntary placement" is the out-of-home placement of a minor by a child care agency at the request of a parent, guardian, or person standing *in loco parentis* and is usually accomplished without court supervision. In contrast, "involuntary placement" is the out-of-home placement of a minor by a child care agency pursuant to court order. This latter category includes placement of abused, neglected and abandoned children, juvenile delinquents, and status offenders.

For statewide estimates of number of foster children voluntarily placed, see H. GOLDIN, *supra* note 12, at 3 (New York - 82%); J. PERS, *supra* note 12, at 15 (California - 50%); Geiser, *The Shuffled Child and Foster Care*, 10 TRIAL 27, 27 (1974) (Massachusetts - 50%); Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. PITT. L. REV. 1, 29 (1973) (Pennsylvania - 90%); N.J. DYFS Interview, *supra* note 12 (New Jersey - 75%).

16. See, e.g., J. PERS, *supra* note 12, at 43; Mnookin, *supra* note 10, at 601.

17. E.g., in New Jersey parents must be given an opportunity to voluntarily surrender their child before a court proceeding is brought charging them with neglect or abuse. N.J. DYFS Interview, *supra* note 12. See also Mnookin, *supra* note 10, at 601.

18. When a child is voluntarily or involuntarily removed from the home of his biological parents, legal custody generally shifts from the parents to the child care agency. After the child is placed in a foster home, the agency retains legal custody and the foster parents have only physical custody of the child. The placement of a child in a foster home is usually governed by a contract signed by the foster parents and agency. This contract will normally state that the foster parents are to receive a monthly payment from the agency to meet the child's expenses, in return for which the foster parents agree to provide for the child's physical needs and to show genuine concern for the child. *Legal Issues in Foster Care*, *supra* note 15, at 21.

their children.¹⁹ Although in some states this agreement provides that return of the child to the parents is automatic upon request,²⁰ in other states the agency may refuse the parents' request to return the child if agency staff determine that they are not prepared to resume custody at that time.²¹ The parents must then resort to a habeas corpus proceeding for the return of their child.²²

Although foster care was designed as a means of short-term care of children, it has become more than a temporary waiting station. The average length of stay for a child placed in foster care is five years.²³ Most foster children experience more than one placement²⁴

19. Examples of states requiring placement agreements include California, CAL. WELF. AND INSTS. CODE § 16552 (West Supp. 1978) (demonstration counties only) (right to return of child within 24 hours during first three days of placement, and thereafter within fourteen days after written notice of request for return of child is given to county welfare department; agreement not to exceed six months without review by an administrative board); Minnesota, MINN. STAT. ANN. § 257.07 (West 1971) (child returned upon request if in the opinion of the placing agency or commissioner of public welfare the best interests of the child require return); New Jersey, N.J. DYFS Interview, *supra* note 12 (when parent requests return of child, agency must return child or show in court that the best interest of the child would not be served by his return); New York, N.Y. SOC. SERVS. LAW § 384-a (McKinney Supp. 1978); Ohio, OHIO REV. CODE ANN. § 5103.151 (Page Supp. 1978); and Pennsylvania, PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE, MANUAL FOR SERVICES TO CHILDREN AND YOUTH, TITLE 3200, REGULATIONS PUBLIC CHILD WELFARE AGENCIES, regs. 3220 C, 3231 D (1969) (return of child if approved by agency).

20. See, e.g., California statute at note 19 *supra*.

21. See, e.g., *Lee v. Child Care Serv. Del. County Inst. Dist.*, 461 Pa. 641, 337 A.2d 586 (1975) (voluntary placement agreements executed by parents and a child care agency that condition return of the child upon agency approval are not violative of fourteenth amendment due process).

The dilemma surrounding placement agreements centers around whether they should be treated as a strictly contractual arrangement or whether inquiry should be made into the parents' improved situation at the discretion of the agency before the child is returned. See, e.g., *Teeter v. Pruiksma*, 82 Misc. 2d 88, 367 N.Y.S.2d 629 (1975) (favoring the contractual aspects of the placement agreement); cf. *Ruth v. Beaudoin*, 55 App. Div. 2d 52, 389 N.Y.S.2d 473 (1976) (implied contractual right to have the child returned on demand cannot and should not prevent court inquiry to determine the best interests of the child); *Commonwealth v. Children's Servs.*, 224 Pa. Super. Ct. 556, 307 A.2d 411 (1973) (noting that contracts concerning the custody of children are voidable agreements subject to being set aside if in the best interests of the child).

One argument in favor of honoring the terms of the agreement is that if the child is not returned to the parent upon demand, parents will be discouraged from surrendering the child because of fear of relinquishing a right to custody and care, and ultimately the child will suffer. *Lee v. Child Care Serv. Del. County Inst. Dist.*, 461 Pa. 641, 652, 337 A.2d 586, 591 (1975) (Nix, J., dissenting).

22. N.Y.U. L. REV., *supra* note 11, at 459. See also *Lee v. Child Care Serv. Del. County Inst. Dist.*, 461 Pa. 641, 652, 337 A.2d 586, 591 (1975) (Nix, J., dissenting) (responsibility to initiate a proceeding and sustain the burden of proof should lie with the agency if the agency refuses to return the child).

23. This average is gathered from a composite of studies across the country. See Maas, *Children in Long-Term Foster Care*, 48 CHILD WELFARE 321, 323 (1969) (31% of the children studied from all over the country were in foster care ten or more years, 52% for six years or longer, 24% spent between three and six years in foster care and 24% left care in less than three years); FLA. STAT. ANN. § 409.168 (West Supp. 1978) (seven out of ten children placed in foster care in Florida do not return to the home of their legal parents within the first year); Geiser, *supra* note 15, at 29 (average length of stay in foster care in Massachusetts is five years); N.J. DYFS Interview, *supra* note 12 (average length of placement in New Jersey is 5.1 years); H. GOLDIN, *supra* note 12, at 10 (mean number of years of care for children in foster

and visit infrequently or not at all with their biological parents.²⁵ Case review of children in foster care (before the implementation of child placement review systems and in those states presently without such a system) is within the province of the child-placing agency. The frequency and thoroughness of these reviews are within the agency's discretion.²⁶

III. Description and Evaluation of the Review Schemes

Any meaningful child placement review system should seek to halt needless entry into foster care and to move children out of foster care and into permanent homes²⁷ as quickly as possible. Social scientists have observed that "children require affection, protection, guidance, and care in [sic] a direct, intimate and continuous basis by adults who are personally committed to assume such responsibility. It is crucial that the child feel wanted."²⁸ Authorities also agree that

care in New York City is from 4.3-5.2 years); M. JONES, *supra* note 12, at 15, 25 (60-68% of children in foster care in Pennsylvania have been in care more than two years and of these children 26-38% have been in care seven years or more). See also S. VASALY, *supra* note 11, at 54.

24. *E.g.*, Geiser, *supra* note 15, at 29 (nationwide, average number of placements for a child in foster care is 2.7, including one-third of children who have from three to seven moves); N.J. DYFS Interview, *supra* note 12 (on the average, children in foster care in New Jersey have been in two different placements); H. GOLDIN, *supra* note 12, at 10 (45% of foster children in New York City had been in one foster home, 26% in two foster homes and 29% in more than two foster homes); Interview with Barbara Chappell, Director, Children's Foster Care Review Board System and Office of Child Advocacy, Columbia, S.C. (Aug. 17, 1978) [hereinafter cited as S.C. Chappell Interview] (average number of placements for foster child in South Carolina is three). See also S. VASALY, *supra* note 11, at 56.

25. *E.g.*, N.J. DYFS Interview, *supra* note 12 (43.1% of children in foster care in New Jersey have not visited their biological parents in one year or more); Festinger, *supra* note 11, at 241 (25% of children in foster care in New York City studied had no contact with biological parents since initial placement and another 25% had no contact in six months or more); S.C. Chappell Interview, *supra* note 24 (50% of children in foster care in South Carolina have not seen their biological parents in one year or longer). See also Steketee, *supra* note 2, at 7; S. VASALY, *supra* note 11, at 33, 52.

26. See NATIONAL COUNCIL OF JUVENILE COURT JUDGES, ANNUAL REPORT OF THE PROJECT EVALUATOR, CHILDREN IN PLACEMENT PROJECT 13, Appendix B, Table 3 (July 8, 1976) (unpublished) (available at address in Note 50) (data compiled from review of court-ordered foster care placement records in 12 cities across the United States showed that in 30.7% of the cases, no court review or action had been taken in 3-10 or more years, although in nearly one-half of the cases parental rights has been terminated over five years ago). See also study reported in Backus, *Foster Care Review: An Ohio Example*, 57 CHILD WELFARE 156, 158-59 (1978) (study of the agency review procedure indicated the need for continuous monitoring of the cases of children in the custody of agencies).

27. The phrase "permanent home" refers to a child living with his biological parents, relatives, or guardian, or with persons by whom he has been legally adopted. Foster care is not considered to provide a permanent home because the child is frequently moved from one foster home to another and placement is of uncertain duration.

28. 1975 Hearings, *supra* note 10, at 11 (statement of Dr. Albert J. Solnit, Director, Child Study Center of Yale University). Dr. Solnit suggests standards for planning and review of children in foster care, *e.g.*, children between the ages of 4-6 should be in temporary foster care for no more than 12 months, and children 6 and older should not be placed in temporary foster care for longer than 18 months. *Id.* at 12-14. See also *In re Orzo*, 84 Misc. 2d 482, 488, 374 N.Y.S.2d 554, 561 (1975) (court describes as "every child's birthright—a permanent, stable,

upon removal of a child from his home, the agency and biological parents should cooperate to make a plan specifying the intended length of the separation and the action that will be taken by both parties to promote return of the child to his home.²⁹

Within the past eight years a number of states have adopted legislation requiring some type of periodic review of children placed outside their homes. Approximately twenty states now have some type of placement review system,³⁰ although the class of children affected, the frequency of review, and the composition of the reviewing body vary significantly. Generally, the different review systems can be classified into three basic types:³¹ agency, judicial or court-administered, and citizen board review.³²

A. Agency Review

Agency review refers to an internal procedure of periodic case review by a panel of social services workers according to a legislatively mandated schedule.³³ Case review by the child care agency responsible for placing the child is the least expensive of the three methods of review. The staff needed to conduct reviews is already available³⁴ and is familiar with the operation of the child care system, the delivery of supportive services in the community, and the obstacles to providing children with permanent homes. Since only the agency staff and perhaps a judge, if the agency petitions the court, will view personal records of the concerned parties, the prob-

loving and nurturing home"); Bronfenbrenner, *Nobody Home: The Erosion of the American Family*, 12 PSYCH. TODAY 40, 43 (May, 1977).

29. See, e.g., Steketee, *supra* note 2, at 5; Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 679 (1976). A written statement of the responsibilities and performance of both parents and agency can be used to promote a clearer understanding between the parents and the agency and to serve as documentation in any further proceeding.

30. CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE, Appendix L (1978); Wald, *supra* note 29, at 632. See Clayburn, Magura, & Resnick, *Periodic Review of Foster Care: A Brief National Assessment*, 55 CHILD WELFARE 395 (1976).

31. One exception to this model is the "Oregon Project," supported by a grant from the U.S. Children's Bureau, Office of Child Development, Dep't of HEW. The project staff selected cases of foster children who were not likely to return home and made them the focus of an intensive permanent placement effort. OVERCOMING BARRIERS TO PLANNING FOR CHILDREN IN FOSTER CARE, U.S. DEPT OF HEW PUB. NO. (OHDS) 78-30138 (1978).

32. Many states have adopted a review procedure that is a hybrid of two or more of these categories. E.g., the New Jersey legislative scheme requires judicial review within fifteen days after the court is notified of the removal of the child from her home, and citizen board review within 45 days after initial placement and annually thereafter. N.J. STAT. ANN. §§ 30:4C-50 to 4C-65 (West Supp. 1978).

33. The Ohio system comes closest to demonstrating the agency review concept although Ohio requires the agency to submit a report of each review to the court or, alternatively, to a citizen board for approval. OHIO REV. CODE ANN. § 5103.151 (Page Supp. 1978).

34. Implementing a review system would probably require a reorganization of existing agency personnel and possibly the acquisition of additional staff.

lem of disclosure of confidential records to laypersons during reviews is avoided.³⁵ Aggressive caseworker attitudes may have a great impact on reducing the number of children in foster care³⁶ without the increased bureaucratization³⁷ accompanying more elaborate review systems.

Numerous disadvantages, however, attend this type of review. Internal agency review presents a conflict of interest because the agency monitors its own performance.³⁸ The perspective of the agency may not conform with the best interests of the child or the parent, because the agency has an interest in maintaining children in care for continued funding.³⁹ Also, agency workers may become reconciled to a foster care placement for a child,⁴⁰ or may be hindered in finding permanent placements because they are assigned heavy caseloads.

Internal case review has not proved effective in finding permanent homes for children.⁴¹ Children have been kept in foster care for lengthy periods⁴² during which ties to their biological family weaken; they have been transferred from one foster home to another,⁴³ severing the emotional bond created between the foster parents and child; and agencies have failed to move quickly to place

35. See notes 181-95 and accompanying text *infra*.

36. See, e.g., Jones, *Aggressive Adoption: A Program's Effect on a Child Welfare Agency*, 56 CHILD WELFARE 401 (1977). The "Aggressive Adoption" program, developed in Cumberland County, Pennsylvania, established a separate adoption unit that worked in cooperation with the agency foster care staff to make adoptive plans for as many foster children as possible. The increase in the number of children adopted was significant.

37. See E. CLAYBURN AND S. MAGURA, FOSTER CARE CASE REVIEW IN NEW JERSEY: AN EVALUATION OF ITS IMPLEMENTATION AND EFFECTS 3 (1977) (Final Report of a Research Project funded by the Dep't of HEW) (independent child placement review criticized because it does not confront the problems of obsolete state laws, insufficient preventive and supportive family services, lack of subsidized adoption programs, insufficient casework staff, and family problems stemming from low socioeconomic status).

38. Chappell & Hevener, *Periodic Review of Children in Foster Care: Mechanisms for Review* 3 (Child Service Association publication) (Mar. 1977). See, e.g., OHIO REV. CODE ANN. § 5103.151(B)(3) (Page Supp. 1978). No judicial or external review is undertaken in this program except review by the court of a written report of every foster care review that the agency is required to prepare and submit to the court. The report compares the agency's performance with what is in the best interests of the child.

39. See H. GOLDIN, *supra* note 12, at 18; M. JONES, *supra* note 12, at 15-16 (financial incentive needed for private agencies to release children for adoption); Wald, *supra* note 29, at 679.

40. See, e.g., *In re Bonez*, 48 Misc. 2d 900, 266 N.Y.S.2d 756 (1966).

41. S.C. Chappell Interview, *supra* note 24. See also Analysis of 1977 Review of Children in Placement, New Jersey Division of Youth and Family Services 2 (1977) (unpublished) (available in Dickinson Law Review files) (in over 60% of the cases of children in foster care placements in New Jersey in 1977, the goal listed by the caseworker in a 1977 foster care survey was to maintain the child in foster care); H. GOLDIN, *supra* note 12, at 18 (agency personnel have not made an adequate effort within a reasonable period to free children for adoption and to recruit adoptive parents).

42. See note 23 and accompanying text *supra*.

43. See note 24 and accompanying text *supra*.

children for adoption once parental rights have been terminated.⁴⁴

Another disadvantage of intra-agency review is that it often fails to provide safeguards incorporated in alternate review systems. Unlike typical citizen review boards⁴⁵ or judicial hearings⁴⁶ that afford interested parties notice prior to the review, the opportunity to attend the review and to be heard, and the right of appeal, internal agency review generally makes no provision for notice to the parents, foster parents, or child. These parties are not present at the agency review, nor are they allowed to send a representative, and a route of appeal to an independent authority from agency actions or decisions may not be specified.⁴⁷

Although periodic review of cases by social services staff alone is inadequate to find permanent homes for children in foster care, when supplemented by one of the following forms of independent review, it provides a necessary component of a system of independent child placement review.⁴⁸

B. Judicial or Court-Administered Review

Judicial or court-administered review takes two forms: (1) pure judicial review,⁴⁹ in which a judge personally reviews the cases of all children who have been in foster placement for a certain length of time; and (2) court-administered review,⁵⁰ in which a staff composed either of voluntary workers or employees of the court periodically reviews the cases of children placed in foster care and selects those

44. See note 26 and accompanying text *supra*.

45. See Part III, section C *infra*.

46. See Part III, section B(1) *infra*.

47. Compare N.Y. SOC. SERVS. LAW § 392 (McKinney Supp. 1978); S.C. CODE § 43-13-50 (Supp. 1978); and STATE ADVISORY BOARD, MANUAL OF POLICIES AND PROCEDURES RELATING TO THE CHILDREN'S FOSTER CARE REVIEW BOARD SYSTEM IN SOUTH CAROLINA, 17-19 (Aug. 1977) (unpublished) (available in Dickinson Law Review files) [hereinafter cited as S.C. PROCEDURES MANUAL] with OHIO REV. CODE ANN. § 5103.151 (Page Supp. 1978).

48. Chappell regards agency review as complementary—"for case planning but not accountability." S.C. Chappell Interview, *supra* note 24.

49. The New York judicial review system has the longest history, having been enacted in 1971. N.Y. SOC. SERVS. LAW § 392 (McKinney Supp. 1978) (the authorized child care agency must petition the family court to review status of foster children who have been in placement for a continuous period of eighteen months, and review occurs thereafter at twenty-four month intervals). Another state using a judicial review system is Florida. FLA. STAT. ANN. § 409.168 (West Supp. 1978).

50. Court-administered review is exemplified by the Concern for Children in Placement Project (CIP) sponsored by the National Council of Juvenile Court Judges. Phase I of this project, currently in effect in twelve cities across the United States, requires trained volunteers to review periodically cases of children in court-ordered foster care. The goal of the project is to promote removal of foster children from temporary care. Phase II expands the number of program sites. See materials provided by CIP Staff, National Council of Juvenile Court Judges, P.O. Box 8978, Reno, Nevada 89507.

cases that they determine require judicial attention.⁵¹

1. *Pure Judicial Review.*—Periodic and rigorous court review of foster care placements by a concerned judge who is trained and experienced in the child care field is a paradigm against which all other systems should be compared.⁵² The court commands the resources to gain the most complete understanding of the family's situation and to enforce its decision.⁵³ A judge can conduct a searching review of the case, scrutinizing the actions of parents, agency, and child, and he can set realistic goals for movement of the child out of temporary care. The court provides an impartial forum with due process requirements to protect the rights and interests of all parties. A judicial determination has the additional strong advantage of qualifying a state for federal funding at an increased level under Title IV-A of the Social Security Act.⁵⁴

The major disadvantages of judicial review are the cost, notwithstanding increased federal funding of children in foster care, and the amount of judicial time needed for thorough review.⁵⁵ The expense of judicial monitoring of cases has resulted in brief⁵⁶ and

51. A staff is used to minimize the cost of the review procedure and to maximize the time that a judge can spend on cases demanding of his attention.

52. See 1975 Hearings, *supra* note 10, at 3 (statement of The Honorable John P. Steketee, Chairman, Children in Placement Project sponsored by the National Council of Juvenile Court Judges).

53. Judicial decisions carry more weight than decisions or recommendations of court workers or review boards. Chappell & Hevener, *supra* note 38, at 3.

54. 42 U.S.C. § 608(a) (1976). When a child from a family that is otherwise eligible for AFDC is placed in foster care as a result of a judicial determination that continued stay of the child in his home is contrary to the welfare of the child, the state qualifies for an increased level of federal funds. 42 U.S.C. § 608(f) (1976) requires that a plan, including provision for periodic review of the need for out-of-home child placement, be developed for each child. HEW regulations, 45 C.F.R. § 220.19(c) (1978), require a state to determine continued appropriateness of and need for placement through periodic reviews, at least annually.

The increase in the level of federal funding is substantial. For example, New Jersey would be eligible to obtain an estimated \$1.5 million in the first year of its review program and more than \$3 million by the third year. State of New Jersey, Statement of Insts., Health and Welfare Comm. to Senate Comm. Substitute for Senate, No. 3246, 2 (1977). An initial judicial determination upon removal of the child from his home suffices to qualify for the increased level of funds.

55. The legislature would have to double the number of family court judges in South Carolina to meet the foster placement review caseload if judicial review was implemented, according to a review board administrator. S.C. Chappell Interview, *supra* note 24. New Jersey has also found judicial review too expensive to adopt. Address by Harold Rosenthal, Acting Director of the Division of Youth and Family Services, State of New Jersey, Conference on Permanency, Security and Love: A Child's Right (Apr. 5, 1977).

56. *E.g.*, Wald, *supra* note 29, at 683; Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROB. 226, 274-75 (1975). Annual review hearings in each of two California counties were observed in two independent studies.

In both counties the majority of hearings lasted between two and five minutes. Typically, neither the parent nor the caseworker were present, neither the need for continued placement nor the efforts being made to facilitate return of the child to his home were examined, and no plans were made. In one county approximately two-thirds of the hearings took two minutes or less, 6% took ten minutes or more, and the longest review lasted twenty minutes. Nearly all the case decisions were based upon information from two to three page reports prepared by

infrequent⁵⁷ reviews. A child may remain in foster care for a period of years before the reviewing process is effective in freeing him for permanent placement, which counteracts the benefits intended by the law. Judicial review may best be used, therefore, in combination with review by a panel of citizens, because each reviewing body can supplement the strengths of the other.⁵⁸

2. *Court-administered Review.*—The use of a trained staff to screen cases allows the judge freedom to spend more time with cases in which a child is not moving towards a permanent placement.⁵⁹ The judge himself may choose to review all cases at wide intervals, interspersed with the administrative review, or he may review only those cases brought to his attention by the periodic examination of placement records by his staff. These methods are less expensive than judicial review of every case.⁶⁰ Court-administered review alone, however, would not enable a state to qualify for an increased level of federal funding, without an initial judicial determination that removal of the child from his home would be in his best interests.⁶¹

An administrative system of review has other deficiencies not encountered in some of the schemes. Administrative review occurs without the knowledge or input of the biological parents, foster parents, or other parties, and is usually based solely upon the examination of written records. Also, the volunteers or court staff who review cases may have only limited access to confidential records. Because of the incomplete nature of reviews, some children who could benefit greatly from judicial review are not identified.⁶²

Court-administered review relies heavily upon the judgment of the employee, and reviews conducted by teams rather than individuals would be preferable.⁶³ Reviewers should be chosen from a group of people outside the child welfare system to preserve the independent nature of the review.⁶⁴

caseworkers. One or both biological parents appeared in only 19% of the cases, and over 90% of the dispositions continued foster care. *Id.* at 274-75.

57. *See, e.g.*, FLA. STAT. ANN. § 409.168 (West Supp. 1978) (review after six months in care and thereafter at least annually); N.Y. SOC. SERVS. LAW § 392 (McKinney Supp. 1978) (review after eighteen months in care and every twenty-four months thereafter).

58. *See* notes 52-54 and accompanying text *supra* and notes 66-73 and accompanying text *infra*; *See also* H. GOLDIN, *supra* note 12, at 38-39. *See, e.g.*, N.J. STAT. ANN. §§ 30:4C-50 to 4C-65 (West Supp. 1978); TENN. CODE ANN. § 37-1501 to 37-1510 (1977 and Supp. 1978).

59. Chappell & Hevener, *supra* note 38, at 6.

60. *Id.*

61. *See* note 54 *supra*.

62. Chappell & Hevener, *supra* note 38, at 6.

63. M. JONES, *supra* note 12, at 36.

64. *Id.*

C. Citizen Board Review

Citizen board review⁶⁵ refers to periodic review of foster care placements by a panel composed of citizens who are typically appointed by an elected official or judge. Board members are chosen from a group of people having interest or experience in child care, and they often receive a per diem reimbursement for participation in review proceedings. The frequency of reviews depends upon legislative mandate.

Citizen participation in the review process promotes community awareness of problems faced by foster children and agencies.⁶⁶ The review board is able to look closely at the foster care system in operation and board members often become advocates of the need for increased resources.⁶⁷ Citizen review boards use judicial time efficiently. A judge becomes involved only when a person is aggrieved by an action or decision of the board or when the case is referred for judicial action.⁶⁸ The citizen board can spend more time to review a case than might a judge and allow interested parties the opportunity to attend and be heard at the review.⁶⁹ The size of the reviewing body helps ensure that the decision will be a collective one, incorporating the expertise of individual members.⁷⁰ The impartial nature of the decision is reinforced because of the independence of the board from the child care agency.⁷¹

Administration of citizen board review on a statewide basis allows the continuous monitoring of a particular child or sibling group by the same citizen board.⁷² Many states using a statewide citizen board review system have formed a statewide advisory council, which develops uniform policies, procedures and training methods, gathers statistics, and provides a focal group to articulate foster care

65. South Carolina has used citizen board review since 1974. In the South Carolina system five members sit on each board, and every judicial circuit has at least one review board. Each board is responsible for reviewing the cases of approximately 100 children. The program is coordinated by a small staff and includes a legislatively mandated State Advisory Board composed of representatives from the local boards. S.C. CODE §§ 43-13-10 to 43-13-80 (1976 and Supp. 1978); Chappell, *Organizing Periodic Review in Foster Care: The South Carolina Story* 54 CHILD WELFARE 477 (1975); S.C. PROCEDURES MANUAL, *supra* note 47. Other states using a citizen review board system include Arizona, ARIZ. REV. STAT. §§ 8-515 to 8-515.04 (Supp. 1978), and Maryland, MD. SOC. SERVS. ADMIN. CODE ANN. §§ 114-120 (1979).

66. S.C. Chappell Interview, *supra* note 24; N.J. DYFS Interview, *supra* note 12.

67. S.C. Chappell Interview, *supra* note 24.

68. Chappell & Hevener, *supra* note 38, at 8-9.

69. *Id.* at 8.

70. *Id.* at 8-9.

71. *Id.* at 8.

72. *Id.* Festinger observed that in New York City the vast majority of judicial reviews of the same child over a period of time are not heard by the same judge. Festinger, *The Impact of the New York Court Review of Children in Foster Care: A Followup Report*, 55 CHILD WELFARE 515, 522-23 (1976) [hereinafter cited as *Followup Report*].

needs before the state legislature.⁷³ An administrative staff is necessary in a citizen board review system to organize and assist the boards.⁷⁴

The disadvantages of citizen board review center around possible staffing problems. The composition of the board is a crucial element to the success of this system. A board should be staffed by interested and capable people who are available for reviews. Although the majority of states using this system of review provide a per diem reimbursement to board members,⁷⁵ which may encourage professionals to contribute their time,⁷⁶ and although minimum guidelines for board selection are usually provided,⁷⁷ effective board members may be difficult to obtain. Lay citizens may not be sufficiently knowledgeable about the child care system to make informed decisions, or they may defer to the agency's recommendation without question.⁷⁸

To assemble the most effective board possible, potential members should be carefully screened and prepared for board duty. A finite term of board membership should be specified⁷⁹ and members with a record of poor attendance should be dismissed.⁸⁰

IV. Preserving the Integrity of Child Placement Review: Common Concerns Among the Review Systems

A. *Need for Hearings*

Although each review scheme has different characteristics, the

73. See, e.g., S.C. CODE § 43-13-10 (1976); N.J. STAT. ANN. § 30:4C-62 (West Supp. 1978); Chappell & Hevener, *supra* note 38, at 8.

74. Chappell & Hevener, *supra* note 38, at 9-10. In South Carolina the staff also includes an attorney to assist the boards in petitioning the court. S.C. Chappell Interview, *supra* note 24.

75. See, e.g., N.J. STAT. ANN. § 30:4C-57 (West Supp. 1978); S.C. CODE § 43-13-30 (1976); but cf. TENN. CODE ANN. § 37-1505 (1977) (no compensation or reimbursement of expenses to be provided); New Jersey Senate Bill 1208(8) (1978) (no compensation but reimbursement for all reasonable and necessary expenses provided).

76. S.C. Chappell Interview, *supra* note 24.

77. See, e.g., N.J. STAT. ANN. § 30:4C-57 (West Supp. 1978) (each board to consist of five members who are county residents; board members to have either training, experience or interest in issues concerning child placement or child development; members should represent the socioeconomic, racial and ethnic groups of that county); OHIO REV. CODE ANN. § 5103.151 (Page Supp. 1978) (if appointed, board is to be composed of one member representing the general public and four members who are trained or experienced in the care or placement of children); TENN. CODE ANN. § 37-1505 (1977) (each board may include a pediatrician or other doctor, a lawyer, a member of a human resource agency, a mother or father with a minor child, and a person between the ages of 18 and 25).

78. S.C. Chappell Interview, *supra* note 24 (concerning deference to agency's recommendation).

79. See, e.g., N.J. STAT. ANN. § 30:4C-57 (West Supp. 1978); OHIO REV. CODE ANN. § 5103.151 (Page Supp. 1978); TENN. CODE ANN. § 37-1505 (1977).

80. See S.C. PROCEDURES MANUAL, *supra* note 47, at 6.

various schemes share the need for certain features to ensure effective review. One necessary feature is a periodic hearing to review the status of children in foster placement.

Not all child placement review paradigms include a hearing.⁸¹ Some review systems make no provision for any interested party to be present⁸² or to submit a writing to the reviewing authority.⁸³ Even those states that provide for judicial review almost uniformly specify that the court may dispense with the hearing and make a determination based upon affidavits and writings submitted to the court with the parties'⁸⁴ consent.⁸⁵

Hearings at which all interested parties are present provide a better means of accomplishing the legislative purpose of child placement review than a closed-door agency determination or a "paper review."⁸⁶ The reviewing authority can obtain information from the caseworker, parents, foster parents, child and others present at the hearing to more fully understand the particular situation and can re-examine the plan for achieving a permanent home for the child. The reviewing body is also able to remind parents and agency representatives of their responsibilities toward the child and to monitor and record their performance.

The full hearing provides greater protection for the rights of all concerned parties, by ensuring that they are aware that a review will take place and are given the opportunity to be present at the proceeding. These protections are especially necessary for the biological parents because their right to custody of the child may be jeopardized by their inaction over the course of a few proceedings.⁸⁷ In rec-

81. A hearing is not held when an agency determination is made, or when a "paper review" by a judge or citizen board, or a review by a member of the court administrative staff, is conducted.

82. See, e.g., OHIO REV. CODE ANN. § 5103.151 (Page Supp. 1978); CIP staff review described in note 50 and accompanying text *supra*.

83. Even if the opportunity to submit a statement is available, many parents may be unaware of the opportunity or too poor to obtain assistance in preparing a statement. See Geiser, *supra* note 15, at 27.

84. The interpretation of the term "party" in the foster placement review context varies from state to state but generally includes the biological parents, foster parents, and agency. It is often unclear whether the child is a party.

85. See, e.g., FLA. STAT. ANN. § 409.168(3)(b) (West Supp. 1978); N.Y. SOC. SERVS. LAW § 392(6) (McKinney Supp. 1978); VA. CODE § 16.1-282(C) (Supp. 1978) (hearing to be scheduled if judge, upon review of agency's petition to court, determines good cause has been shown); see also New Jersey Senate Bill 1208(5), (10) (1978) (proposed amendment to N.J. STAT. ANN. §§ 30:4C-50 to 4C-65 (West Supp. 1978)) (court to make initial review based solely upon written materials; thereafter citizen board to make reviews with discretion to request appearance of any notified party). But cf. ARIZ. REV. STAT. § 8-515 (1978) (parties always notified and permitted to attend hearing).

86. S.C. Chappell Interview, *supra* note 24. See also *Followup Report*, *supra* note 72, at 516, 543.

87. See *In re Carl & Annette N.*, 91 Misc. 2d 738, 398 N.Y.S.2d 613 (1977); N.Y. SOC. SERVS. LAW § 384-b(7) (McKinney Supp. 1978) (failure to visit and plan for the child constitutes grounds for involuntary termination of parental rights); TENN. CODE ANN. § 37-1502

ognition of the biological parents' interest in the foster care review, the court in *Guardianship of Denlow*⁸⁸ held that biological parents are entitled to a plenary and evidentiary hearing, and advance notice of the possible dispositional alternatives. Since the review is meant to be of primary benefit to the child,⁸⁹ no other party should be allowed to waive the hearing.

Some programs have chosen to limit the scope of review not only by limiting hearings, but also by excluding either voluntary⁹⁰ or court-ordered⁹¹ placements from review. Review of both types of out-of-home placement is necessary, however. Voluntary placements most often occur without court intervention, and would never be scrutinized by a body independent of the child care agency if not included in the child placement review scheme. Although involuntary placement occurs as a result of a court order, a subsequent proceeding is necessary to assure prompt return of the child to the biological parents or termination of parental rights, since the average length of foster placement is five years.⁹²

B. Timing of Hearings

Many systems for review of voluntary placements call for a hearing only after the child has been in care continuously for a certain period.⁹³ To halt inappropriate entry into foster care, however, the child should not be placed outside his home initially⁹⁴ unless removal is necessary for his physical or emotional health. The most certain method of preventing unnecessary foster care placement is to

(Supp. 1978) (noncompliance by the parent with the statement of responsibilities prepared upon initial placement provides grounds for termination of parental rights). See also CAL. CIVIL CODE §§ 232(a)(7), 232.1(a)(7) (West Supp. 1978).

88. 87 Misc. 2d 410, 412 n.3, 384 N.Y.S.2d 621, 625 n.3 (1976).

89. See, e.g., FLA. STAT. ANN. § 409.168 (West Supp. 1978). "It is the intent of the Legislature . . . to help ensure a permanent home for children in foster care by providing a periodic review and report on their status." See also N.J. STAT. ANN. § 30:4C-51 (West Supp. 1978): "[I]t is the purpose of this act to establish procedures for both administrative and judicial review of each child's placement in order to ensure that such placement serves the best interest of the child."

90. See, e.g., TENN. CODE ANN § 37-1501(c) (1977). The CIP program applies only to court-ordered placement of children. See note 50 *supra*.

91. See, e.g., New Jersey Senate Bill 1208(4) (1978).

92. See note 23 and accompanying text *supra*.

93. E.g., FLA. STAT. ANN. § 409.168 (West Supp. 1978) (first review occurs after child is in foster care for a continuous period of six months); N.Y. SOC. SERVS. LAW § 392 (McKinney Supp. 1978) (review after the child has been in foster care for a continuous period of eighteen months; if the child is removed from foster care for less than three months, the previous period in care is tacked to the re-entry period); S.C. CODE § 43-13-40 (1976) (review after child is in foster care for six months); VA. CODE § 16.1-282(A) (Supp. 1978) (first review takes place twelve months after the filing of a foster care plan for the child).

94. In certain instances holding a hearing before the child is removed may not be feasible, for example, when the child is temporarily abandoned by his parents. A hearing should then be held as soon as possible after the child has left his home.

require a hearing before removing the child from his home.⁹⁵ The judge can determine whether available support services would eliminate the need for foster care.⁹⁶ Provisions of a hearing would also ensure that surrender of the child is voluntary⁹⁷ and provide a time to specify the terms of the agreement, make a plan for the return of the child to the home,⁹⁸ set up a visitation schedule,⁹⁹ and explain to the parents the consequences of their failure to fulfill their obligations towards the child.¹⁰⁰ Also, if the child is being removed from his home because he has been abused, this should be noted on the record and not hidden beneath a "voluntary" agreement because it may furnish support for termination of parental rights in the future.

Reviews should occur on a regular schedule after the initial removal hearing. In addition to cyclic monitoring, a child's placement in foster care should be reviewed in a hearing upon the occurrence of any event that may significantly affect the need for continued placement.¹⁰¹ These events might include the agency's intention to place

95. The New Jersey procedure requires that the hearing take place within fifteen days after notice is received by the court that the child has been removed from his home. N.J. STAT. ANN. § 30:4C-54 (West Supp. 1978). Logic dictates, however, that the hearing be held before the child is displaced.

Reasons for introduction of judicial review of voluntary placements in New Jersey include the following: (1) to advise parents of their rights (*e.g.*, to regain child); (2) to protect parents by ensuring that the placement is voluntary and to determine if continued placement outside the home is warranted; and (3) to protect the best interests of the child by deciding whether he should be returned home. Interview with Steven Yoslov, Chief, Juvenile and Domestic Relations Court Services, Administrative Office of the Courts, State of New Jersey (Aug. 17, 1978).

96. Provision of supportive services to the family (*e.g.*, day care, homemaker services, mental health counseling, housing programs, AFDC, food stamps or job training) are available either directly or through purchase by the state agency and may alleviate the need for out-of-home placement. N.J. DYFS Interview, *supra* note 12; S.C. Chappell Interview, *supra* note 24.

97. See *In re H.*, 77 Misc. 2d 807, 355 N.Y.S.2d 52 (1974) (one of the primary purposes of § 358-a of the New York Social Services Law is to scrutinize voluntary placements). N.Y. SOC. SERVS. LAW § 358-a (McKinney Supp. 1978).

At least one state requires a hearing for voluntary *relinquishment* of parental rights to ensure that the parent's consent to termination of parental rights is voluntary, deliberate and intelligent. See *In re Adoption of Wolfe*, 454 Pa. 550, 312 A.2d 793 (1973). Although the focus here is on temporary surrender of child custody, this surrender together with noncompliance with the foster care plan in Tennessee, TENN. CODE ANN. § 37-1502 (Supp. 1978), or failure to visit and plan for the child in New York, N.Y. SOC. SERVS. LAW § 384-b(7) (McKinney Supp. 1978), is sufficient for a decree of involuntary termination of parental rights, and therefore, a hearing is also necessary when the child is temporarily surrendered to protect the parents' rights and the child's welfare.

98. In many review systems the agency and parent must together develop a foster care plan when the child is removed from the home. *E.g.*, N.J. STAT. ANN. § 30:4C-55 (West Supp. 1978); VA. CODE § 16.1-281 (Supp. 1978).

99. Studies indicate a strong correlation between the frequency of parental visiting and discharge of children from foster care. *E.g.*, Fanshel, *Parental Visiting of Children in Foster Care: Key to Discharge?*, 49 SOC. SERV. REV. 493, 501-02 (1975); Maas, *supra* note 23, at 324-25.

100. See note 87 and accompanying text *supra*.

101. E. CLAYBURN AND S. MAGURA, *supra* note 37, at 1-4. Clayburn views the two types of periodicity as complementary. Time orientation signals when no progress is being made in

the child in a new foster home or in an institution,¹⁰² the intent to separate siblings,¹⁰³ or improvement of the parent's ability to care for the child, for example, because of release from prison or a treatment center. Reviews should also be available upon the petition of foster parents¹⁰⁴ and other interested parties.¹⁰⁵

The length of the period between reviews is a critical factor in the effectiveness of a review program. Reviews too widely spaced will permit the weakening of family ties and will lessen the chance of the child's returning home.¹⁰⁶ Prolonged stay in foster care is often marked by multiple placements, which may have emotionally damaging effects on the child.¹⁰⁷ Furthermore, as the child advances in age he becomes more difficult to place for adoption.¹⁰⁸ Reviews should be spaced widely enough, however, to allow the parents a period in which to demonstrate compliance with the plan and to show interest in the child. In determining the frequency of review, the child's perspective of the passage of time should be considered.¹⁰⁹ What may seem a short period of out-of-home placement to an adult, for example a period of six months, may be perceived by a child to include a major portion of his life.

More frequent reviews are feasible when a less expensive review procedure is used. Currently, the range among review programs extends from a six month cycle to a twenty-four month cycle.¹¹⁰ The shorter cycle of six months is preferable because foster placement can be more frequently reviewed and placement of the child in a permanent home hastened.¹¹¹

a case, and event orientation allows the most rapid possible detection and response to changes in the case.

102. See *In re Mark H.*, 80 Misc. 2d 593, 363 N.Y.S.2d 73 (1974) (foster care review proceeding in which the agency was directed not to institutionalize the child again without the court's permission).

103. See *F.B. v. State*, 319 So. 2d 77, 79 (Fla. Dist. Ct. App. 1975) (court has responsibility to protect interests of children removed from their parental home as a sibling group).

104. See, e.g., *In re Custody of Mack*, 81 Misc. 2d 802, 367 N.Y.S.2d 644 (1975); N.Y. SOC. SERVS. LAW § 392(2) (McKinney Supp. 1978).

105. See, e.g., TENN. CODE ANN. § 37-1509 (1977) (any interested party is allowed to file petition for rehearing while the child is under the jurisdiction of the court).

106. See Chappell & Hevener, *supra* note 38, at 4.

107. *Id.* See also note 129 and accompanying text *infra*.

108. Chappell & Hevener, *supra* note 38, at 4.

109. See J. GOLDSTEIN, A. FREUD, AND A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 40-49 (1973) [hereinafter cited as GOLDSTEIN].

110. E.g., FLA. STAT. ANN. § 409.168 (West Supp. 1978) (judicial review after six months in placement and thereafter annually); N.J. STAT. ANN. § 30:4C-54, 4C-58 (West Supp. 1978) (review by judge within fifteen days of placement, review by citizen board within forty-five days of placement and annually thereafter by citizen board); N.Y. SOC. SERVS. LAW § 392 (McKinney Supp. 1978) (judicial review after 18 months and biennially thereafter); S.C. CODE § 43-13-40 (1976) (semi-annual citizen board review).

111. One administrator of a review program expressed the view that reviews should be held at three to four month intervals. S.C. Chappell Interview, *supra* note 24.

C. Standards for Scrutinizing Out-Of-Home Child Placement

1. *Judicial Determinations to Remove the Child From the Home.*—When a child is placed outside his home pursuant to court order, the standard applied by the court in determining whether to remove the child will depend upon the state's reason for intervention. Involuntary out-of-home placement may be ordered as part of the disposition in a juvenile court proceeding¹¹² or upon a finding of parental neglect¹¹³ or abuse.¹¹⁴ Voluntary placements are most frequently arranged between parents and agency without court supervision.¹¹⁵ If, however, a hearing is held before the parents voluntarily surrender their child, the standard applied by the court in deciding whether to remove the child is whether continued stay in the home

would be contrary to the welfare of the child.¹¹⁶

2. *Standards for Continuance of Out-Of-Home Care.*—The general standard applied¹¹⁷ when there is a conflict regarding custody between the biological parent and the agency or foster parent is whether return of the child to his home would be in the child's best interests.¹¹⁸ The best interests standard is perhaps the most nebulous¹¹⁹ and yet the most crucial standard applied by the courts in determining a child's welfare. Courts for many years have linked the best interests of the child with other parties to the custody proceeding. The child's best interest frequently is considered identical to the rights of the biological parent,¹²⁰ and in some proceedings counsel for the petitioning agency also represents the child since their interests are presumed to be identical.¹²¹

112. See, e.g., N.J. STAT. ANN. § 2A:4-61 (West Supp. 1978). See also H. GOLDIN, *supra* note 12, at 3.

113. For a thorough analysis of child neglect proceedings and a proposed standard for initial state intervention on behalf of neglected children see Wald, *supra* note 29, at 642-660.

114. See, e.g., N.Y. FAMILY COURT ACT § 1052 (McKinney 1975). See also H. GOLDIN, *supra* note 12, at 3.

115. Geiser, *supra* note 15, at 27.

116. See, e.g., N.J. STAT. ANN. § 30:4C-54 (West Supp. 1978). See also notes 118-45 and accompanying text *infra*.

117. See also Wald, *supra* note 29, at 660-76 (discussion of a proposed standard tailored to custody determinations of neglected children).

118. See N.Y.U. L. REV. *supra* note 11, at 448-49.

119. Elements taken into consideration in determining a child's best interests vary with the court, the type of action, and the relationship of the parties to the child. LEGAL ISSUES IN FOSTER CARE, *supra* note 15, at 20-21.

120. See, e.g., *Ruth v. Beaudoin*, 55 App. Div. 2d 52, 389 N.Y.S.2d 473 (1976); *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959). See also *In re Kimberly P.*, 84 Misc. 2d 887, 376 N.Y.S.2d 791 (1975); GOLDSTEIN, *supra* note 109, at 65-66. *But cf. In re S.*, 74 Misc. 2d 935, 347 N.Y.S.2d 274 (1973) (dilemma of parental rights in conflict with children's rights); *In re S.*, 74 Misc. 2d 154, 347 N.Y.S.2d 470 (1973) (discussing the best interests of the child with respect to the rights of the biological parents).

121. J. PERS, *supra* note 12, at 20. See also Katz, *Foster Parents versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145, 153 (1966). *But cf. In re Alexander*, 206 So. 2d 452 (Fla. 1968) (foster parents of child for

Courts also recognize and incorporate into the best interests determination the "paramount parental right to raise one's own child."¹²² Thus, when the best interests standard is applied in proceedings in which the parents' interests diverge from those of the child, the parents' interests are often accorded greater weight.¹²³ One illustration of this conflict is the case of *Ross v. Reeves*.¹²⁴ Two children had been taken from their biological parents upon a finding of neglect and placed with foster parents for several years. The biological parents successfully sought a court order to take the children from the foster parents and place them in an orphanage. The orphanage was to provide a "neutral" setting in which the children could reestablish ties with their biological parents, and the foster parents were prohibited from visiting the children. The paramount right protected was not the children's interest in a stable and emotionally secure home but rather the custodial interest of the biological parent.

Another legal principle often employed in child custody cases is the biological parents' right to custody of the child until they are proved unfit.¹²⁵ For example, in *Spence-Chapin Adoption Service v.*

four years desired to adopt child but the agency claimed they were too old to adopt; court ordered adoption over agency disapproval); *In re Klug*, 32 App. Div. 2d 915, 302 N.Y.S.2d 418 (1969) (Tilzer, J., concurring) (discussing the conflict in the agency role as binder of family wounds and protector of the best interests of the child); *In re Bonez*, 48 Misc. 2d 900, 266 N.Y.S.2d 756 (1966) (counsel for the agency said he regarded foster home care as meeting all the child's needs, and the court concluded that the agency was ineffective in giving these minority children a permanent home). For further recognition of the divergence of interests between child and agency see GOLDSTEIN, *supra* note 109, at 66; Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565, 575 (1976); Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 289-90 (1971).

122. *E.g.*, *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 435, 324 N.Y.S.2d 937, 943 (1971).

123. *See, e.g.*, *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959). The New York Court of Appeals approved the transfer of a five year old girl from the home of her foster parents to the agency for new foster placement, pending "eventual" return home to her biological mother. The girl had spent four years with her foster parents and she identified them as her own parents. They desired very much to adopt her. The court found it to be in the best interests of the child to remove her before "further damage is done." Psychiatrist for the appellants had testified in substance that the child was well-adjusted in her foster home and that removal from her foster home might prove emotionally disruptive. The agency conceded that the child was in a good home environment but they wanted to place her in a "neutral environment." *See also* *Ross v. Reeves*, No. W66F243J (Ill. Civ. Ct. Mar. 9, 1973); *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974); GOLDSTEIN, *supra* note 109, at 54.

124. No. W66F243J (Ill. Civ. Ct. Mar. 9, 1973).

125. *See, e.g.*, *Doe v. G.D.*, 149 N.J. Super. 419, 370 A.2d 27 (1976); *Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971); *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971). *But cf. In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) (the court must expressly find that parental custody would be detrimental to the child, supported by evidence that parental custody would actually harm the child, to withhold custody from parent).

*Polk*¹²⁶ the court posited that "[c]hild and parent are entitled to be together, unless compelling reason stemming from dire circumstances or gross misconduct forbid [sic] it in the paramount interest of the child. . . ." ¹²⁷ The best interests of the child, however, require that the child should not be shuffled around in foster care but should be given a permanent home, even if his biological parents are fit but unwilling or unable to resume custody in the near future.¹²⁸ Emotional, mental, and social problems of the foster child increase with the length of time in care.¹²⁹

A more realistic judicial approach in making custody determinations should be based upon certain fundamental premises. One premise is that the child should always be a party to the proceeding.¹³⁰ He has a direct and personal interest in the decision and his rights may be adversely affected by it. In *Stapleton v. Dauphin County Child Care Service*¹³¹ the court regarded the foster child as a party and observed that to say the child is the subject of the action but not a party is to adopt the view of child-as-chattel.¹³²

Courts should recognize that the best interests of the child are independent of and sometimes conflicting with the rights of other parties.¹³³ Neither the parent nor the agency can adequately represent the child in a custody proceeding because their interests are not identical.¹³⁴ The parental interest in custody should be recognized by judicial acceptance of a rebuttable presumption that the biological parents are best fit to care for their child.¹³⁵ Although the best interests of the child must be regarded as paramount to the right to

126. 29 N.Y.2d 196, 274 N.E.2d 431, 324 N.Y.S.2d 937 (1971).

127. *Id.* at 199, 274 N.E.2d at 432-33, 324 N.Y.S.2d at 939.

128. See N.Y.U. L. REV., *supra* note 11, at 447. "Rarely . . . have the courts adequately resolved the tension often present in the natural parents' assertion of a biological right to a continuous relationship with their child and the child's need for a caring and stable home environment." *Id.* at 447. See also *In re Orzo*, 84 Misc. 2d 482, 374 N.Y.S.2d 554 (1975) (observing that a child is no less in limbo when kept in foster care year after year when the parent is physically and financially able to provide a home but fails to do so).

129. Geiser, *supra* note 15, at 35; H. GOLDIN, *supra* note 12, at 10-12.

130. See GOLDSTEIN, *supra* note 109, at 65-67. The authors note that courts and legislatures have failed to grant the child party status except in juvenile delinquency proceedings. *Id.*

131. 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974).

132. *Id.* at 392, 324 A.2d at 573.

133. See notes 120-21 and accompanying text *supra*. See also *Teeter v. Pruiksma*, 47 App. Div. 2d 101, 364 N.Y.S.2d 656 (1975) (in habeas corpus proceeding instituted by biological family against foster parents to demand return of the child, the child's appointed guardian contended that the child has rights independent of those of his biological or foster parents and requested a full hearing with best interests determination, unrestricted by a presumption in favor of any party).

134. *In re Kimberly P.*, 84 Misc. 2d 887, 376 N.Y.S.2d 791 (1975).

135. See *In re Two Minor Children*, 283 A.2d 859 (Del. Ch., 1971). See also *Bennett v. Jeffreys*, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976) (prolonged separation of mother and child for most of child's life is a major factor in rebutting the presumption in favor of parental custody).

rear one's own child,¹³⁶ the rights of the biological parents should receive strong judicial consideration. This view has received increasing judicial approval in recent years.¹³⁷

The best interest standard should be defined to hinge not upon the quality of surroundings, but rather on the display of continued interest and concern and maintenance of a relationship with the child.¹³⁸ When these are shown all efforts should be made to maintain parental custody.¹³⁹

Another fundamental consideration is that a judge's decision whether to award custody to the biological parents or to the adoptive parents to best serve the child's interest is subjective,¹⁴⁰ and the outcome is incapable of prediction.¹⁴¹ Considerations used in the best interests determination should be statutorily defined with room for the discretion of the judge.¹⁴² The judge should be required to specify the factual grounds supporting his decision, which provides a basis for review and imposes a limit on judicial discretion.¹⁴³

Finally, the interests of the public must be considered.¹⁴⁴ Although not formally present at the proceedings, the public has an interest in the tax money spent to support the child and in ensuring that the child has the best upbringing possible, to assure that he will become a productive and well-adjusted member of the commu-

136. See N.Y.U. L. REV., *supra* note 11, at 446-47 (reviewing United States Supreme Court decisions recognizing the importance of the family unit).

137. See, e.g., *In re Camm*, 294 So. 2d 318 (Fla. 1974); *In re Orzo*, 84 Misc. 2d 482, 374 N.Y.S.2d 554 (1975) (the New York Legislature has shown increasing solicitude for the rights of children when children's rights have come in conflict with parent's rights); *In re L.*, 77 Misc. 2d 363, 353 N.Y.S.2d 317 (1974); *In re Petition for Relocation of Children From Foster Home for the Purpose of Placement in a Permanent Home*, No. 13 Adoptions 1975, 14 Adoptions 1975 (Pa. D. & C., C.P. Cumb. Aug. 30, 1978); *In re Z.*, 81 Wis. 2d 194, 260 N.W.2d 246 (1977). See also *In re Kimberly P.*, 84 Misc. 2d 887, 376 N.Y.S.2d 791 (1975) (presumption that the biological parent has a superior right to the child weakens when the parent surrenders custody for a long period).

138. See note 28 and accompanying text *supra*.

139. See Goldstein, *supra* note 5, at 649-50.

140. For a case in which courts of two states applied the best interests standard and reached contrary decisions see *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971); N.Y.U. L. REV., *supra* note 11, at 455 n.56 (description of contrary holding in *Scarpetta*).

141. See, e.g., *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977) (Brown, C.J., concurring). The judge, in referring to questions of child placement, wrote, "On what do we draw in making these choices? Are we, as Federal Judges, endowed with sufficient prescience to decide such delicate issues?" *Id.* at 1212. See also GOLDSTEIN, *supra* note 109, at 49-52; Mnookin, *supra* note 56, at 226-293.

142. N.Y.U. L. REV. *supra* note 11, at 469-70; see *In re Petition for Relocation of Children From Foster Home for the Purpose of Placement in a Permanent Home*, No. 13 Adoptions 1975, 14 Adoptions 1975 (Pa. D. & C., C.P. Cumb. Aug. 30, 1978). Elements might include the preference of the child, the length of separation from biological parents and their demonstration of continued interest in the child, and the length of time the child has lived with the foster parents.

143. Mnookin, *supra* note 56, at 277-81.

144. *In re Z.*, 81 Wis. 2d 194, 260 N.W.2d 246 (1977).

D. Safeguarding the Rights of the Parties

1. *Notice.*—Notice of the foster care review proceeding should be given to all interested parties.¹⁴⁶ Although notice of a judicial or citizen board hearing is usually required by statute,¹⁴⁷ most jurisdictions employing court-administered or agency review make no provision for notice of the review.¹⁴⁸

Notice of a hearing to both biological parents is normally required in all statutory review schemes,¹⁴⁹ if the whereabouts of both parties are known. It is important to notify both parents to give each an opportunity to come forward and show interest in the child,¹⁵⁰ even if the parents are separated.¹⁵¹ Preferably, notice should do more than merely alert the parties of a hearing. Parents should be informed of the specific issue that will be considered¹⁵² and advised that failure to appear and assume responsibility for the child may result in the deprivation of parental rights.¹⁵³ Notice should be timely¹⁵⁴ and in writing.

In addition to notice to biological parents, notice should be given to the foster parents.¹⁵⁵ As parties interested in the promotion of the child's welfare, foster parents should have the right to attend

145. See *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977).

146. This would include relatives of the child who have shown an interest in the custody of the child. See *Wilson v. Family Servs. Div.*, Region Two, 554 P.2d 227 (Utah 1976); (*In re A.A. Mc.*, 140 Ga. App. 786, 232 S.E.2d 104 (1976).

147. See, e.g., ARIZ. REV. STAT. § 8-515 (SUPP. 1978); FLA. STAT. ANN. § 409.168(4) (West Supp. 1978); N.J. STAT. ANN. § 30:4C-59 (West Supp. 1978) (notice of hearing, to be provided at least fifteen days in advance to the agency, chairperson of the review board, child, child's parent or legal guardian, and any other persons or agencies whom the court determines have an interest in, or information relating to, the welfare of the child); N.Y. SOC. SERVS. LAW § 392 (McKinney Supp. 1978) (notice, including a statement of dispositional alternatives, to be given to the agency, foster parents, child's parent or guardian who transferred the care and custody of the child temporarily to the agency, a person to whom a parent entrusted the care of the child, when that person transferred the care of the child to the agency, and to other persons as the court may direct); VA. CODE § 16.1-282(C) (Supp. 1978).

148. See, e.g., OHIO REV. CODE ANN. § 5103.151 (Page Supp. 1978). *But cf.* CAL. WEL. & INSTS. CODE § 16557(d) (West Supp. 1978) (demonstration counties only) (notice of administrative review given to minor's parents or guardians).

149. See note 147 *supra*.

150. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *In re Baby Boy S.*, 349 So. 2d 774 (Fla. Dist. Ct. App. 1977) (when the putative father gives any affirmative indicative of interest in the child he must be given notice and a hearing before parental rights can be taken away).

151. At least 40% of foster children come from one-parent families. Geiser, *supra* note 15, at 27.

152. See, e.g., New York requirement of a statement of dispositional alternatives, *supra* note 147.

153. Notice of this type is required in dependency proceedings, see *In re Martin*, 3 Wash. App. 405, 476 P.2d 134 (1970). See also note 87 *supra*.

154. See, e.g., New Jersey statute at note 147 *supra*.

155. See, e.g., ARIZ. REV. STAT. § 8-515(D) (Supp. 1978) (notice given to any foster parents in whose home the child has resided within the last six months, except those foster parents

any hearing regarding the welfare of their foster child.¹⁵⁶ Notice of the proceeding to the child or child's legal representative is likewise necessary since the child is the focus of the proceeding and is most affected by the determination. Finally, children of a certain age should be given the opportunity to voice their feelings to the judge, citizen board, or legal representative.¹⁵⁷

2. *Representation*.—Most child placement review systems are silent regarding any party's right to representation by appointed or retained counsel or to bring another person with him to a review.¹⁵⁸ No federal constitutional right to counsel has yet been found for indigent parties in foster care proceedings.¹⁵⁹ Nevertheless, at least one state court has ruled that indigent parents are entitled to appointed counsel in child placement review proceedings.¹⁶⁰ A larger number of states require that counsel be appointed to represent indigent parents in proceedings for permanent deprivation of the custody of their child,¹⁶¹ because of the fundamental nature of a parent's custodial interest¹⁶² and the recognition that the proceeding may result in the loss of substantial rights.¹⁶³

maintaining a "receiving" foster home). *But cf.* N.J. STAT. ANN. § 30:4C-59 (West Supp. 1978) (notice to foster parents not specifically required).

156. *See* James v. McLinden, 341 F. Supp. 1233 (D. Conn. 1969) (discussing rights of foster parents). *See generally* Comment, *Foster Parents' Emerging Due Process Rights in Pennsylvania*, 83 DICK. L. REV. 123 (1978).

157. *See* Allen v. Dep't for Human Resources, 540 S.W.2d 597 (Ky. 1976) (ten year old child's wishes should be carefully considered in granting custody because if the child opposes the decision, efforts to provide him with a permanent home will be defeated); Commonwealth v. Children's Servs., 224 Pa. Super. Ct. 556, 307 A.2d 411 (1973). *But cf.* Guardianship of Denlow, 87 Misc. 2d 410, 416 n.8, 384 N.Y.S.2d 621, 627 n.8 (1976) (child's wish to be adopted by foster parents is dismissed by court as being "immature," "emotional" and of little meaning). *See generally* Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 FAM. L.Q. 1 (1977).

158. *See, e.g.*, FLA. STAT. ANN. § 409.168 (West Supp. 1978); N.J. STAT. ANN. §§ 30:4C-50 to 4C-65 (West Supp. 1978).

159. Although the United States Supreme Court has found a right to counsel for indigents in certain criminal proceedings, Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972) and juvenile delinquency actions, *In re Gault*, 387 U.S. 1 (1967), they have not extended the right to counsel for indigents generally in civil proceedings. Although lacking the legal effect of affirming the lower court ruling, the Court has declined to review a case denying indigent parents the right to counsel in child dependency proceedings. *Kaufman v. Carter*, 402 U.S. 964, *denying cert. to* 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970). *See generally* Comment, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989 (1975).

160. *In re Janice K.*, 82 Misc. 2d 983, 372 N.Y.S.2d 381 (1975).

161. *See, e.g.*, Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) (applying California law); Danforth v. State Dep't of Health & Welfare, 303 A.2d 794 (Me. 1973); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973); *Crist v. New Jersey Div. of Youth & Family Servs.*, 135 N.J. Super. 573, 343 A.2d 815 (1975); *In re B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); *State v. Jamison*, 251 Or. 114, 444 P.2d 15 (1968); *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973); *In re Lusier*, 84 Wash. 2d 135, 524 P.2d 906 (1974); *State ex rel. Lemaster v. Oakley*, 203 S.E.2d 140 (W. Va. 1975). *See also* CHILDREN'S DEFENSE FUND, *supra* note 30, at Appendix E, Tables II and III.

162. *See, e.g.*, *In re B.*, 30 N.Y.2d 352, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972).

163. *See, e.g.*, *In re Adoption of R.I.*, 455 Pa. 29, 312 A.2d 601 (1973).

In the foster care review setting, the danger of loss of parental rights may not be perceived because parental rights will not be terminated in the review proceeding itself. Parental rights may, however, be terminated subsequently in a separate proceeding because of a parent's failure to show continued interest in and to plan for his child.¹⁶⁴ To protect the rights of the parent and the interest of the child the parent must be informed at the hearing of the consequences of his failure to assume responsibility for the child as specified in the foster care plan. If counsel is not appointed, the judge, citizen board, or agency representative should assist the parent in fixing a visitation schedule and should make certain that the parent understands his rights and responsibilities. The parent should be given counsel in the subsequent termination proceeding if the child's representative¹⁶⁵ recommends that parental rights be terminated.¹⁶⁶

Various means are available to provide representation for the child.¹⁶⁷ These include the appointment of a legal guardian, other counsel substitute, or an attorney.¹⁶⁸ The child needs representation¹⁶⁹ because his interest in the proceeding is the most substantial, he is unable to speak effectively for himself, and his interests are not adequately represented by anyone else.¹⁷⁰ The appointment of counsel to protect the interests of the child in foster care review proceedings usually is not required by statute.¹⁷¹ Many states specify in proceedings involving neglect, abuse, or the possible termination of parental rights that appointment of counsel for the child is at the court's discretion.¹⁷²

Foster parents have traditionally been extended few rights in connection with their child care responsibilities.¹⁷³ Courts have viewed the foster parent-child relationship strictly according to the terms¹⁷⁴ of the foster care agreement.¹⁷⁵ Yet foster parents have a

164. See note 87 and accompanying text *supra*.

165. See notes 167-72 and accompanying text *infra*.

166. See note 161 and accompanying text *supra*.

167. See generally Genden, *supra* note 121.

168. For various alternatives to counsel for the child see Genden, *supra* note 121, at 594-95.

169. The appointment of a legal representative for the child in placement decisions is advocated by authorities in the juvenile law field. See GOLDSTEIN, *supra* note 109, at 66-67; NATIONAL COUNCIL OF JUVENILE COURT JUDGES, *supra* note 26, at 10. See also Genden, *supra* note 121, at 581-86 (discussing possible sources of authority for the appointment of a representative for the child).

170. See notes 120-21, 123, 125, 130 *supra*.

171. See, e.g., FLA. STAT. ANN. § 409.168 (West Supp. 1978); S.C. CODE §§ 43-13-10 to 43-13-80 (1976 and Supp. 1978).

172. See J. PERS., *supra* note 12, at 29.

173. See Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 287-301 (1971); Comment, *The Rights of Foster Parents to the Children in Their Care*, 50 CHI.-KENT L. REV. 86, 87-102 (1973).

174. See Katz, *supra* note 173, at 288; 9 CONN. L. REV. 496 (1977).

175. For text of a sample foster care agreement see Katz, *supra* note 173, at 288-89.

special and important interest in proceedings concerning the child's custody. They are the de facto custodians¹⁷⁶ of the child and often have a personal interest in the child's future because of the nature of the foster care relationship,¹⁷⁷ the length of the child's stay in their home, and possibly the desire to adopt the child.¹⁷⁸ Only in recent years have courts begun to grant foster parents standing to intervene in custody determinations concerning the foster child.¹⁷⁹ Foster parents who have cared for a child for a specified period, for example four months, should be allowed to intervene as interested parties in any proceeding affecting the child. Because the foster parent is not generally accorded parental rights,¹⁸⁰ foster parents will have to retain their own counsel.

3. *Confidentiality*.—The problem of confidentiality is perhaps the most troublesome and unresolved area of the review proceeding.¹⁸¹ Much information must be collected by the reviewing authority to make an appropriate determination.¹⁸² Also, the various parties need to be fully informed to properly assess and advocate their own positions, cross-examine witnesses, and challenge the accuracy of records. Many of the documents that would supply relevant information, however, are considered confidential.¹⁸³ Confidential

176. The agency is the de jure custodian of the child. Note 18 *supra*.

177. Foster parents are asked to assume a role during long-term placement of the child that is inherently contradictory; they are expected to be substitute parents without forming an emotional attachment to the child. Katz, *supra* note 173, at 290-91.

178. State practices differ in according foster parents preference in adoption proceedings to adopt a child for whom they have cared. See *Legal Issues in Foster Care*, *supra* note 15, at 11-12.

179. See, e.g., *Cennami v. Dep't of Pub. Welfare*, 363 N.E.2d 539 (Mass. App. Ct. 1977); *Mundie v. Nassau County Dep't of Social Servs.*, 88 Misc. 2d 273, 387 N.Y.S.2d 767 (1976); *Stapleton v. Dauphin County Child Care Serv.*, 228 Pa. Super. Ct. 371, 324 A.2d 562 (1974). See also *In re Kimberly P.*, 84 Misc. 2d 887, 376 N.Y.S.2d 791 (1975) (court reasoned that the longer the foster parents care for the child, the stronger their interest becomes). But cf. *Eason v. Welfare Comm'r*, 171 Conn. 630, 370 A.2d 1082 (1976) (foster parents of seven years have no standing to bring action to revoke commitment of child to agency); *W.C. v. P.M.*, 155 N.J. Super. 555, 383 A.2d 125 (1978) (foster parents have no standing or protected interest to demand plenary hearing before agency removes child); *Ocasio v. Ocasio*, 49 App. Div. 2d 801, 373 N.Y.S.2d 702 (1975) (foster parents failed to establish right to intervene in custody proceeding because they had not cared for child for the statutorily required period of twenty-four months).

180. See *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977) (foster parent relationship gives rise to no state-created constitutional right as the "psychological parent" of the child). See also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977). But cf. *Pennsylvania Att'y Gen. Op. No. 27*, 4 Pa. Bull. 134 (1974) (rights of foster parents stemming from fundamental family relationship should be no less significant than those of a biological parent).

181. See also Levine, *Access to "Confidential" Welfare Records in the Course of Child Protection Proceedings*, 14 J. FAM. L. 535 (1975-76).

182. Although an extensive amount of material is generally included in the child's casework file, any abstract or summary may be biased, inadequate, and time-consuming to compile.

183. The Tennessee foster care review law requires that any plan, record, report, review or material prepared in connection with the planning, placement, or care of a child in foster care

information may include the child's file, the record of events and observations recorded by the social worker concerning the biological parents, foster parents and child, the background of foster parents, and in some cases even the foster parents' identity.¹⁸⁴ This problem is compounded because a number of laypeople are given access to confidential information in the course of court-administered¹⁸⁵ or citizen board review.

Clearly, some of this information must be divulged for meaningful review. Disclosure of the reason for surrender and frequency of parental contact is essential. New York has established standards relating to the breadth of disclosure allowed in judicial review in the three-part case of *In re L.*¹⁸⁶ In the first part of the decision the court required the agency to furnish the parents' counsel with a list stating the general nature of the materials held by the agency and to move for a protective order concerning those matters contested. The court permitted *in camera* review by parents' counsel of materials that the child care agency agreed to disclose, and judicial examination of records that the agency refused to disclose to determine the requesting party's need for the information. Immaterial and irrelevant confidential records were not disclosed.¹⁸⁷ In the second part of the opinion, the court announced that the standard applied in deciding to permit disclosure is whether disclosure of the information is in the best interests of the child. The court further explained that it must have access to the complete record of the case when making this determination.¹⁸⁸

The foster parent was recognized as a party to the review in the third part of the decision of *In re L.*, but his opportunity to obtain disclosure of records was held available only upon a showing of "necessity," coupled with an *in camera* viewing.¹⁸⁹ The subsequent case of *In re Louis F.*¹⁹⁰ interpreted the showing of necessity required of foster parents as qualitatively stricter than the showing required of the biological parents because of the less significant relationship of

is not a matter of public record and must remain confidential. TENN. CODE ANN. § 37-1507 (Supp. 1977).

184. New Jersey foster parents remain anonymous to the biological parents of the child for whom they care. N.J. DYFS Interview, *supra* note 12.

185. See *Bailey v. Affleck*, Civil Action File No. 75-302 (R.I. Super. Ct. Feb. 10, 1975) (volunteers recruited by Family Court granted access to certain casefiles and information for use in the Children In Placement Project).

186. 45 App. Div. 2d 375, 357 N.Y.S.2d 987 (1974). This case includes many litigants raising different issues for determination and the opinion is divided into three fact situations and opinions.

187. *Id.* at 382-83, 357 N.Y.S.2d at 994-95.

188. *Id.* at 384-85, 357 N.Y.S.2d at 996-97.

189. *Id.* at 386-87, 357 N.Y.S.2d at 999.

190. 54 App. Div. 2d 104, 387 N.Y.S.2d 856 (1976).

the foster parent to the child.¹⁹¹

Other New York courts, attempting to preserve confidentiality, have instructed attorneys not to reveal the information obtained from agency records to their clients.¹⁹² The court in *In re L.*, however, maintained that a blanket instruction forbidding the mother's counsel to make abstracts of the materials disclosed should only issue when clearly needed.¹⁹³

South Carolina, a state using citizen board review,¹⁹⁴ enforces the requirement of confidentiality by informing each review board member of its importance and necessity, requiring all records of review proceedings, documents, and notes of board members to be kept in a locked file when the board is not in session, and subjecting board members to the same standards of confidentiality as Department of Social Services employees of the state, including the imposition of sanctions for violations.¹⁹⁵

4. *Appeal.*—Most current legislation does not specify the right of appeal from a foster placement review decision or the appropriate procedure.¹⁹⁶ This right of appeal should be specifically provided by statute. For judicial review systems, the appropriate appellate forum should be identified. Judicial appeal should also be made available to parties dissatisfied by the action or decision of a citizen review board¹⁹⁷ or agency panel.

V. Conclusion

A variety of elements external to the review scheme itself are essential to achieve the goal of providing permanent homes for foster children. One necessary complement of a review system is a workable statute for termination of parental rights.¹⁹⁸ A state should also

191. *Id.* at 106-07, 387 N.Y.S.2d at 858.

192. *E.g., In re L.*, 77 Misc. 2d 363, 353 N.Y.S.2d 317 (1974).

193. *In re L.*, 45 App. Div. 2d 375, 385, 357 N.Y.S.2d 987, 997 (1974).

194. S.C. PROCEDURES MANUAL, *supra* note 47, at 29. *See also* S.C. CODE § 43-13-60 (Supp. 1978) (all agencies that provide for foster care of children must cooperate with review board by furnishing requested records).

195. Another potential source of confidentiality requirements is found in the Social Security Act, 42 U.S.C. § 602(a)(9) (1976); *see also* 45 C.F.R. 205.50 (1978). These provisions apply to AFDC programs and in some cases have been extended to a broader variety of child welfare programs. Levine, *supra* note 181, at 539-45.

196. *See, e.g.,* FLA. STAT. ANN. § 409.168 (West Supp. 1978); N.J. STAT. ANN. §§ 30:4C-50 to 4C-65 (West Supp. 1978).

197. *See, e.g.,* S.C. CODE § 43-13-50 (Supp. 1978); TENN. CODE ANN. § 37-1509 (1977).

198. *See In re Carl and Annette N.*, 91 Misc. 2d 738, 398 N.Y.S.2d 613 (1977); *In re Orzo*, 84 Misc. 2d 482, 374 N.Y.S.2d 554 (1975); N.Y. SOC. SERVS. LAW § 384-b (McKinney Supp. 1978). *See also* Katz, *Freeing Children for Permanent Placement Through a Model Act*, 12 FAM. L.Q. 203 (1978); Lincoln, *Model Statute for Termination of Parental Rights*, 27 JUV. JUST. 3 (1976); Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 ST. JOHN'S L. REV. 215 (1971).

consider enacting a subsidized adoption law,¹⁹⁹ which would supply permanent homes for children at lower cost to the state than extended foster care.²⁰⁰ Subsidized adoption permits permanent placement of a child not otherwise eligible for adoption because of physical or emotional handicaps or other problems. Finally, consistent with the premise that a child needs a stable and permanent home, the availability of a substantial array of services to families²⁰¹ may eliminate the need for initial removal of the child, at a great cost savings to the public.²⁰²

The provision of an independent child placement review system serves to assure that foster children are given permanent and stable homes. For a greater number of children, however, the determining factor in freeing them from the limbo of foster care will be the aggressive and dedicated attitudes of the people who operate the foster care system.²⁰³

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199. See, e.g., N.C. GEN. STAT. §§ 48-39 to 48-39.2 (1976); PA. STAT. ANN. nn.62, §§ 771-774 (Purdon Supp. 1978). See also CHILDREN'S DEFENSE FUND, *supra* note 30, at Appendix F; *Legal Issues in Foster Care*, *supra* note 15, at 37-40; Katz and Gallagher, *Subsidized Adoption in America*, 10 FAM. L.Q. 3 (1976) (includes model state subsidized adoption statute and regulations).

200. Katz, *supra* note 199, at 6-7.

201. Various sources have noted the need for more support services for families. E.g., J. PERS, *supra* note 12, at 102-06; S. VASALY, *supra* note 11, at 39; Steketee, *supra* note 2, at 5; S.C. Chappell Interview, *supra* note 24.

202. See Kinney, Madsen, Fleming & Haapala, *Homebuilders: Keeping Families Together*, 45 J. CONSULTING AND CLINICAL PSYCH. 667 (1977).

203. See Fanshel, *Status Changes of Children in Foster Care: Final Results of the Columbia University Longitudinal Study*, 55 CHILD WELFARE 143, 152-53 (1976).

